

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

RD DONUT II, INC.

v.

BOARD OF ASSESSORS OF  
THE CITY OF EVERETT

Docket No. F329404

Promulgated:  
October 12, 2018

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the City of Everett ("assessors" or "appellee") to abate a fiscal year 2016 ("fiscal year at issue") tax on real estate located in the City of Everett, owned by Mr. Faissal Daaboul, and occupied by the lessee RD Donut II, Inc. ("appellant").<sup>1</sup>

Commissioner Rose ("Presiding Commissioner") heard this appeal under G.L. c. 58A, § 1A and 831 CMR 1.20 and issued a single-member decision for the appellee.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

*John Angiolillo, pro se, for the appellant.*

*Bernard Devereux, assessor, for the appellee.*

---

<sup>1</sup> As a tenant under an obligation to pay more than one-half of the taxes assessed, the appellant has standing to prosecute this appeal. See G.L. c. 59, § 59.

## **FINDINGS OF FACT AND REPORT**

On the basis of the testimony and exhibits offered into evidence at the hearing of this appeal, the Presiding Commissioner made the following findings of fact.

On January 1, 2015, the relevant valuation and assessment date for the fiscal year at issue, the appellant was a tenant responsible for the payment of taxes under a 10-year, triple-net lease. The parcel is a 5,847-square-foot parcel of real estate improved with a Dunkin' Donuts franchise consisting of 1,154 square feet and located at 339 Main Street in Everett ("subject property").

For the fiscal year at issue, the assessors valued the subject property at \$624,400 and assessed a tax thereon, at the rate of \$37.98 per thousand, in the total amount of \$23,714.71. On December 31, 2015, Everett's Collector of Taxes sent out the actual real estate tax bills for the fiscal year at issue. In accordance with G. L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. On January 28, 2016, in accordance with G.L. c. 59, § 59, the appellant timely filed an application for abatement with the assessors, which they denied on March 7, 2016. On May 2, 2016, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed an appeal with the Appellate Tax Board ("Board"). On the basis of these facts, the

Presiding Commissioner found and ruled that the Board had jurisdiction to hear and decide the instant appeal.

At the hearing of this appeal, John Angiolillo testified on behalf of the appellant. He supported his claim that the subject property was overvalued by using 5 analyses: (1) a comparable sales approach prepared by a realtor; (2) an income approach; (3) a "market value" approach; (4) a cost approach; and (5) a comparable assessment approach.

Regarding the comparable sales approach, the realtor who prepared the analysis did not testify at the hearing of this appeal. She used 2 mixed-use properties that had not yet sold and 2 others that had sold. There was no evidence offered as to the comparability of these properties with the subject property, and no adjustments made to the sale prices of the 2 properties that sold. Because the realtor who prepared the analysis did not testify, as well as the above defects in the analysis, the Presiding Commissioner gave no weight to the comparable sales approach.

For his income approach, Mr. Angiolillo used the current rent and expenses that the appellant paid at the subject property, and a capitalization rate of 8.5 percent that "appraisers . . . are currently using . . . for this type of property." There was no evidence that the current rent and expenses paid under the long-term lease at the subject property

represented market rent and expenses and no support for the capitalization rate that Mr. Angiolillo used. Moreover, Mr. Angiolillo is not a real estate valuation expert and he was not qualified as such by the Presiding Commissioner. Accordingly, the Presiding Commissioner did not give weight to Mr. Angiolillo's income approach.

Mr. Angiolillo also offered an analysis that he called a "market value" approach. He began by suggesting, without supporting data, that the retail rent for space similar to the subject property would be between \$25.00 and \$35.00-per-square-foot. Assuming the \$35.00 per square foot rent, the annual rent would be approximately \$40,000 per year. Deducting the current real estate tax assessment of approximately \$24,000 leaves a net income of \$16,000, which he then capitalized at an overall rate of 8.5 percent to arrive at a building value that even he believed was too low. He then testified that a building value of \$306,000 would be more reasonable, which he calculated based upon his own suggested tax value of \$14,000. The Presiding Commissioner rejected this approach for a number of reasons, including: (1) the suggested rent and capitalization rates were not supported by market data or competent analysis; and (2) backing in to the fair market value by opining what the taxes should have been is not an appropriate or reliable method

of valuing the subject property. Accordingly, the Presiding Commissioner gave this approach no weight.

For his cost approach, Mr. Angiolillo testified that the assessed building value at \$431,000 equates to \$373.00 per square foot for the 1,154-square-foot building. He further testified that in 2012, he razed the former building on the site and built the current structure at a cost of approximately \$230,000, or \$200 per square foot. By adding this cost to the assessed value of the land, Mr. Angiolillo concluded that the subject property should be valued at \$413,000. The Presiding Commissioner rejected this approach because, among other reasons: no supporting documents corroborating the claimed costs to construct were offered into evidence; there was no support or even allegation that the actual costs represented market costs to construct the subject property; there was no evidence of the extent to which portions of the former structure - such as foundation, utilities, and framing - were retained as part of the new construction; and there was no indication that a cost approach is a reliable indicator of value for this type of income-producing retail space. Accordingly, the Presiding Commissioner afforded no weight to Mr. Angiolillo's cost approach.

Finally, Mr. Angiolillo made an argument based on the assessments of 2 other Dunkin' Donuts properties in Everett,

located at 893 Broadway and 520 Broadway. Because the 893 Broadway Dunkin' Donuts has over twice the lot size and finished building area than the subject property, Mr. Angiolillo believed that the subject property's assessment should be one-half the assessment of 893 Broadway. Similarly, because the Dunkin' Donuts at 520 Broadway had 3 times the area of the subject property, he maintained that the subject property's assessment should be one-third the assessment of 520 Broadway. The Presiding Commissioner rejected this analysis because there is no indication that the market value of the properties have such a direct, proportional relationship to building area. The value of these income-producing properties is based on their earning capacities and there was no evidence that the income is directly or proportionally related to the size of the facility.

The assessors for their part offered limited testimony by Bernard Devereux, assessor, who submitted an exhibit regarding capitalization rates of fast food franchises, including Dunkin' Donuts, showing capitalization rates for Dunkin' Donuts franchises of slightly over 6 percent for the relevant time periods.

After considering all of the evidence, the Presiding Commissioner ultimately found that the appellant did not meet its burden of demonstrating that the subject property's assessment exceeded its fair cash value for the fiscal year at

issue. As detailed above, none of Mr. Angiolillo's valuation methodologies constituted credible, persuasive evidence of overvaluation. The most appropriate method to value the subject property would have been a properly conducted capitalization-of-income analysis. However, Mr. Angiolillo's income approach was flawed because there was insufficient evidence of market rents and expenses, and no support for the capitalization rate that he chose.

Accordingly, on the basis of the foregoing findings of fact, the Presiding Commissioner issued a decision for the appellee in this appeal.

#### OPINION

Assessors are required to assess real estate at its "fair cash value." G.L. c. 59, § 38. Fair cash value is defined as the price on which a willing seller and a willing buyer will agree if both of them are fully informed and under no compulsion. ***Boston Gas Co. v. Assessors of Boston***, 334 Mass. 549, 566 (1956).

Generally, the burden of proof is upon the taxpayer to prove that the subject property has a lower value than that assessed. ***Schlaiker v. Assessors of Great Barrington***, 365 Mass. 243, 245 (1974) (citing ***Judson Freight Forwarding Co. v. Commonwealth***, 242 Mass. 47, 55 (1922)). The assessment is

presumed valid until the taxpayer sustains its burden of proving otherwise. **General Electric Co. v. Assessors of Lynn**, 393 Mass. 591, 598 (1984) (quoting **Schlaiker**, 365 Mass. at 245).

In order to determine a property's fair cash value, its highest and best use must first be ascertained. See **Peterson v. Assessors of Boston**, 62 Mass. App. Ct. 428, 429 (2004). In the present appeal, the subject property's actual use was as a fast-food restaurant. The parties did not dispute that the subject property's current use was its highest and best use, nor was there any evidence to the contrary in the record. Accordingly, the Presiding Commissioner concluded that the subject property's continued use as a fast-food restaurant was its highest and best use.

Real estate valuation experts, the Massachusetts courts, and this Board generally rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost reproduction. **Correia v. New Bedford Redevelopment Authority**, 375 Mass. 360, 362 (1978). However, "[t]he introduction of evidence concerning the value based on [cost] computations has been limited to special situations in which data cannot be reliably computed under the other two methods." *Id.* In the instant appeal, the Presiding Commissioner determined that the most appropriate method of valuing the subject property was the capitalization-of-income method. The



appellant provided no information as to why the cost approach would more accurately reflect the subject property's value, especially when there was nothing unique or special to warrant the use of the cost approach over the traditional capitalization-of-income approach.

The use of the income-capitalization approach is appropriate when reliable market-sales data are not available. ***Assessors of Weymouth v. Tammy Brook Co.***, 368 Mass. 810, 811 (1975); ***Assessors of Lynnfield v. New England Oyster House***, 362 Mass. 696, 701-02 (1972); ***Assessors of Quincy v. Boston Consolidated Gas Co.***, 309 Mass. 60, 67 (1941). It is also recognized as an appropriate technique to use for valuing income-producing property. ***Taunton Redevelopment Assocs. v. Assessors of Taunton***, 393 Mass. 293, 295 (1984). Because the subject property was an income-producing property, the Presiding Commissioner found and ruled that the income-capitalization approach was the most reliable methodology with which to determine its fair cash value.

The capitalization of income method analyzes the property's capacity to generate income over a 1-year period and converts the capacity into an indication of fair cash value by capitalizing the income at a rate determined to be appropriate for the investment risk involved. See ***Olympia & York v. Assessors of Boston***, 428 Mass. 236, 239 (1998). When performing

a fee-simple valuation using a capitalization of income approach, the income stream used must reflect the property's earning capacity or market rental value. **Pepsi-Cola Bottling Co.**, 397 Mass. 447, 451 (1986). Using actual income figures may be acceptable, as long as they reflect market rents for the particular type of property involved. *Id.*; see also **Carye v. Assessors of Chelmsford**, 394 Mass. 1001 (1985) (affirming the Board's use of actual rents for valuation because there was substantial evidence in the record to support the Board's conclusion that actual rents were an adequate measure of the earning capacity of the real estate at issue in that appeal). Similarly, the expenses, allowances, and fees deducted should mirror the market. **Olympia & York**, 428 Mass. at 239. In the present appeal, the Presiding Commissioner found that Mr. Angiolillo did not verify or test his use of actual income and expenses from the fourth year of his 10-year lease with the market and he failed to utilize market data in selecting his expense deductions. These failures rendered the reliability and probative value of his selections tenuous at best.

The capitalization rate selected for use in an income-capitalization methodology should consider the return necessary to attract investment capital. **Taunton Redevelopment Assocs.**, 393 Mass. at 295. The assumptions and information used to develop a capitalization rate should be market based. APPRAISAL

INSTITUTE, THE APPRAISAL OF REAL ESTATE 499-500 (13<sup>th</sup> ed. 2008) ("Direct capitalization employs capitalization rates . . . extracted from market data" and "processes a single year's income into an indication of value . . . to produce a supportable indication of value when based on relevant market information."). In the present appeal, the Presiding Commissioner found that Mr. Angiolillo did not properly support or provide adequate foundation for the assumptions upon which he relied in developing his capitalization rate, nor was he qualified to do so.

The Presiding Commissioner also found and ruled that the sheer number of failures and shortcomings associated with Mr. Angiolillo's methodology further served to diminish its probative value. See **May Department Store Co. v. Assessors of Newton**, Mass. ATB Findings of Fact and Reports 2009-153, 193 (finding and ruling that the probative value of a real estate valuation expert's testimony and report "collapsed under the weight of his numerous errors, omissions, and inconsistencies").

The mere production of evidence is not enough to meet the taxpayer's burden of proving overvaluation; the evidence must be credible and persuasive. See **Foxboro Assocs. v. Board of Assessors of Foxborough**, 385 Mass. 679, 691 (1982). As a consequence of Mr. Angiolillo's omissions and failures, the Presiding Commissioner found and ruled that the values derived

from his various valuation methodologies were not reliable, credible, or persuasive indicators of the subject property's fair cash value for the fiscal year at issue.

In reaching his decision in this appeal, the Presiding Commissioner was not required to believe the testimony of any particular witness or adopt any particular method of valuation that a witness suggested. Rather, he could accept those portions of the evidence that he determined had more convincing weight. ***Foxboro Assocs.***, 385 Mass. at 683; ***New Boston Garden Corp. v. Assessors of Boston***, 383 Mass. 456, 473 (1981); ***New England Oyster House***, 362 Mass. at 701-02. "The credibility of witnesses, the weight of evidence, the inferences to be drawn from the evidence are matters for the board." ***Cummington School of the Arts, Inc. v. Assessors of Cummington***, 373 Mass. 597, 605 (1977). Furthermore, the Presiding Commissioner may disbelieve a witness or reject evidence as long as he has an "'explicit and objectively adequate reason.'" ***New Boston Garden Corp.***, 383 Mass. at 470-71.

On this basis, the Presiding Commissioner found and ruled that the appellant failed to demonstrate that the subject property's assessment exceeded its fair cash value for the fiscal year at issue. The Presiding Commissioner, therefore, decided this appeal for the appellee.

**THE APPELLATE TAX BOARD**

By: \_\_\_\_\_  
James D. Rose, Commissioner

A true copy,

Attest: \_\_\_\_\_  
Clerk of the Board